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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARK HARTMANN, a minor by
his parents and next friends,
Roxanna and Joseph Hartmann,

ROXANNA AND JOSEPH HARTMANN,

Petitioners,

v.

LOUDOUN COUNTY BOARD OF EDUCATION,

Respondent.

**On Petition For a Writ of Certiorari
to the United States Court of Appeals
For the Fourth Circuit**

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. THE QUESTIONS PRESENTED ARE PROPERLY HEARD BY THIS COURT.

The Loudoun County Board of Education (hereinafter referred to as "Loudoun") incorrectly asserts in its Brief in Opposition that the Hartmanns have assigned error which involves "the misapplication of a properly stated rule of law". *Brief in Opposition at page 6.*[1] This assertion is without merit. The Hartmanns have assigned two errors. First, that the Fourth Circuit imposed a "rule of law" ("considerable

[1] References to Loudoun's Brief in Opposition will hereinafter be made as "BO" followed by the page number.

deference test") which differs in substance from all other circuits who have interpreted the statute and which improperly thwarts the will of Congress as unequivocally expressed in statute. In addition, the Hartmanns have asserted that this Court has previously rejected an equivalent test ("conclusive if based on substantial evidence") test. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 205; 102 S. Ct. 3034, 3050; 73 L.Ed. 690 (1982).

As fully discussed in the Hartmann's Petition for Writ of Certiorari, several Circuit Courts have reached quite different conclusions on the "rule of law" to be applied in these cases. These decisions span the gamut from the Fifth Circuit's "virtually *de novo*" standard, *Teague Independent School District v. Todd L.*, 999 F. 2d 127, 131 (5th Cir. 1993); to the "modified *de novo*" standard of the 10th Circuit, *Murray v. Montrose County School District RE-1J*, 51 F.3d 921, 931 (10th Cir. 1995); to the Fourth Circuit's "considerable deference" standard in the instant case. It is clear that this question involves a split in the circuits in the formulation of a "rule of law" not in the application of an accepted "rule of law."

Second, the Hartmanns have asserted that the Fourth Circuit failed to apply fundamental rules of law which govern the supervisory role of a court of appeals. Specifically, that the Fourth Circuit (1) failed to apply the long accepted rule of law that the factual findings of a district court shall not be overturned unless they are "clearly erroneous" and (2) that they failed to apply F.R.C.P. Rule 52(a) which requires that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Rule 10(a) of the Supreme Court Rules establishes that this Court favors the granting of a Writ of Certiorari where "a United States court of appeals has entered a decision in conflict with a decision of another United States court of appeals . . . or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Upon consideration of these

factors it is appropriate that this Court grant this Petition for Writ of Certiorari.

A. The Fourth Circuit's rationale for rejecting the district court's findings of fact was not in accord with *Rowley*.

Loudoun asserts that the district court erred in setting aside the administrative decision because *Rowley* dictates approval of the proposed IEP where no procedural defects are found. BO-9. Loudoun's argument is based on a misreading of the *Rowley* decision. While this Court placed great emphasis on the procedural aspects of the *Individuals with Disabilities Education Act*, 20 U.S.C. Chapter 33, §§ 1400 *et. seq.*, (hereinafter "IDEA") it also required that the courts insure that the substance of the IDEA, a free appropriate public education, was in fact being offered the student. Once the courts have determined that there has been procedural compliance they must insure that the individual education program developed through the Act's procedures are "reasonably calculated to enable the child to receive educational benefits." *Rowley* at p. 206-207.

More to the point, this Court has clearly recognized that no presumption flows from an IEP unless the "mainstreaming" preference of the Act have been satisfied. This Court stated "When that 'mainstreaming' preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress." *Rowley* at p. 203. Pursuant to the IDEA the district court was required to decide whether the mainstreaming preferences of the Act had been met. The district court concluded that Loudoun's proposed placement failed to meet these statutory preferences. Under these circumstances, Loudoun's argument (that the district court should not have set aside Loudoun's decision because no procedural defect had been found) clearly misstates *Rowley* and is without merit.

B. The Fourth Circuit established an incorrect standard of review.

Loudoun argues that the Hartmanns have inaccurately portrayed the Fourth Circuit's decision as requiring that "considerable deference" be given to the administrative proceedings and that they have misstated "the entirety of the holding of the Fourth Circuit." BO-9. In fact, the Fourth Circuit stated

> while the district court opinion references the hearing officer's decision its failure to address the administrative findings noted above simply does not reflect the teachings of *Rowley* and *Doyle* that state proceedings ***must command considerable deference*** in federal court.

Emphasis added, A-10. Given the Fourth Circuit's use of this clear and unambiguous language, it is incorrect to argue that the Hartmanns have inaccurately portrayed the decision. The Hartmanns have done nothing more then attribute to this strongly worded directive its obvious meaning.

A fair reading of the Fourth Circuit's decision confirms that the court of appeals both articulated a "considerable deference" standard and then applied it to the present case. In applying the "considerable deference" standard the court of appeals criticized the district court for not addressing two minor factual findings; one contained in the local hearing officer's decision and one contained in the state reviewing officer's decision. A-9, 10. Certainly the "due weight" standard articulated by this Court in *Rowley* (at page 206) would not require that a district court decision be overturned for the failure of the trial judge to address minor factual finding contained in the administrative decisions. Unfortunately, in applying the "considerable deference" test, this is precisely what has occurred.

Perhaps the application of the "considerable deference" standard is best exemplified by the Fourth Circuit's summary dismissal of the extensive additional evidence heard by the district court. The extraordinary lack of attention to this evidence is consistent only with a legal standard that provides

that the state decision "must be given considerable deference" by federal courts.[2] Such a standard is a far cry from the statutory language which requires that the district court base its decision on a preponderance of the evidence which includes both the administrative record and the additional evidence heard by the court.

C. The Hartmanns have not argued for the acceptance of a new standard of review.

Loudoun argues that the Hartmanns have proposed a new standard by suggesting that the district court "was compelled to reduce the weight to be given the administrative proceedings." BO-10. This is a purely semantic argument with no merit. The Hartmann's argument that the weight given the administrative decision should be reduced based on additional evidence is thoroughly consistent with the "due weight" standard. Black's Law Dictionary defines the word "due" to mean "just; proper; . . . reasonable." It defines "due consideration" as "to give such weight or significance to a particular factor as under the circumstances it seems to merit, and this involves discretion." Clearly, the concept of "due weight" carries with it the explicit recognition that the district court will apply to the administrative findings only that "weight" which it reasonably deserves given the totality of the evidence. Given the significance of the additional evidence received by the district court, it properly applied the "due weight" standard when it found that the additional evidence carried greater weight than the administrative findings.

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[2] In practice the Fourth Circuit's application of the "considerable deference" standard is no different than the "conclusive if based on substantial evidence" standard rejected by this Court. *Rowley* at 205.

D. Post-hearing evidence rendered the administrative decision essentially irrelevant.

Loudoun criticizes the Hartmanns for arguing that the additional trial evidence concerning Mark's success in the Montgomery County (Virginia) School System rendered the administrative decision essentially irrelevant. BO-10-11. While the Hartmann's assertion may be strongly worded, it is accurate. The district court was lawfully presented with critical additional evidence which was not available during the administrative proceedings.[3] By statute the district court was required to reach its decision based on a very different set of facts than those available during the administrative proceedings. As a result, the administrative decision was rendered without the benefit of Mark's fifteen months of success in the regular education classroom. Reason and logic compels the conclusion that the administrative decision became essentially irrelevant because this critical evidence was not available.

This argument does not "render meaningless the entirety of the administrative procedures set out under the IDEA" as argued by Loudoun. BO-11. It simply acknowledges that Congress designed a system of legal review which ultimately vested the federal district court with the duty to receive the administrative record and additional evidence and to base its decision on a preponderance of that evidence. The instant case presents just one of many situations in which post-hearing evidence will be such as to require that the administrative decision be reversed.

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[3] In their appeal to the Fourth Circuit, Loudoun did not contend that any of the additional evidence heard by the district court was inadmissible.

E. The Hartmann's request for prospective relief is consistent with the statutory scheme established by the IDEA as interpreted by this Court in *Rowley*.

Loudoun argues that "[T]he Hartmanns incorrectly attempt to create a dual review standard depending on whether the relief sought concerns retroactive tuition reimbursement or the review of the student's IEP." BO-12. In fact no such dual standard of review has been proposed. What the Hartmanns have proposed is that the district court be permitted to apply the "due weight" standard in a manner consistent with the logic of the relief requested. This is precisely where the Fourth Circuit's imposition of a "considerable deference" standard falls short. It simply does not permit the district court to attribute "due weight" to the administrative decision. As the statutory scheme of review clearly provides, the district court must weigh the evidence and reach its conclusion on a preponderance of the evidence. This Court's decision in *Rowley* did not rewrite this statutory scheme and it certainly did not conclude that "the state proceedings ***must command considerable deference*** in federal court." A-10.

F. The Fourth Circuit failed to apply the requisite "clearly erroneous" standard with respect to the district court's findings of fact.

Loudoun argues that the Hartmann's assertion that the Fourth Circuit incorrectly reviewed the district court's findings of fact is not grounds upon which this Court should grant a Writ of Certiorari. BO-12. This argument is not well founded. The failure of the Fourth Circuit to employ the well established "clearly erroneous" standard coupled with its failure to follow F.R.C.P. Rule 52(a) establishes that in the instant case the Fourth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power."

Loudoun attempts to cloud this essential reality by discussing *obiter dicta* found in the decisions of both the district court and the court of appeals. This is best

exemplified by the emphasis Loudoun placed on district court's discussion of the qualifications of the Loudoun professional staff and the response of the court of appeals. The district court found the professionals working with Mark lacked the experience and training to successfully integrate Mark in the regular education classroom. However, the court did not require that Loudoun provide any additional training or require additional licensing. Thus the discussion was nothing more than dictum; as was the Fourth Circuit's statement that "[W]e can think of few steps that would do more to usurp state educational standards than to have federal courts re-write state teaching certification."[4] A-14.

The essential finding of the district court was that Mark was receiving an appropriate education in a regular education classroom in another Virginia school system and therefore was entitled to be educated in a similar setting in Loudoun County. This was a factual finding based on evidenced which was properly received by the trial court. As such, the district court's finding of fact should not have been set aside unless they were clearly erroneous. The district court's findings were not clearly erroneous and the Fourth Circuit made no such conclusion. Thus, the failure of the Fourth Circuit to apply the "clearly erroneous" standard is grounds for this Court to exercise its supervisory powers.

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[4] There is simply nothing in the district court's opinion that suggests it was attempting to "re-write state teaching certifications." In fact, the emphasis the district court placed on the ability of Montgomery County School System to educate Mark suggests quite the opposite. The Montgomery County School System follows the exact same licensing standards and special education regulations as Loudoun. The district court clearly recognized that if one Virginia school system could meet Mark's needs in the regular education classroom so could and should another.

CONCLUSION

The questions presented by the petition filed herein address the fundamental issue of the role of the federal district court in cases filed pursuant to the Individuals with Disabilities Education Act. It is appropriate that this Court grant the petitioner's Writ of Certiorari.

Respectfully Submitted,

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